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# WTO AGREEMENTS MANDATE THAT CONGRESS REPEAL THE FARM BILL OF 2002 AND ENACT AN AGRICULTURE LAW EMBODYING FREE MARKET PRINCIPLES

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## INTRODUCTION

The Farm Security and Rural Investment Act of 2002 ("Farm Bill") runs contrary to the letter of the World Trade Organization ("WTO") agreements and the spirit of ongoing WTO negotiations.[1] When Congress passed the Farm Bill, it represented a fundamental change in the U.S. government's stance on agricultural subsidies.[2]

1. *See* Farm Security and Rural Investment Act of 2002 §§ 1101-1108, 7 U.S.C.A. §§ 7901-7918 (West Supp. 2005) (embodying anti-free trade agricultural policy); *see also* discussion *infra* Part II (demonstrating that the Farm Bill is inconsistent with WTO agreements and ideals).

2. *See* Federal Agriculture Improvement and Reform Act of 1996 §§ 101-115, 7 U.S.C. §§ 7201-7215 (2000) (enacting limits on domestic agricultural subsidies and lessening their adverse effects on global trade in agriculture by decoupling payments from price and production levels); Farm Security and Rural Investment Act §§ 1101-1108 (supplementing the 1996 Federal Agriculture Improvement and Reform Act by implementing direct subsidies and counter-cyclical payments without specifying limits on the amount of funds the Secretary of Agriculture can allocate to individual agricultural producers); *see also* 148 CONG. REC. S4028 (daily ed. May 8, 2002) (statement of Sen. Bunning) (stating that the Farm Bill "reflects a fundamental shift in federal agriculture policy" and undermines the

The Federal Agriculture Improvement and Reform Act of 1996 ("Freedom to Farm Act")[3] eliminated some government subsidies[4] and caused U.S. trade-distorting domestic support to remain well below the amount permitted under the WTO's Agreement on Agriculture.[5] However, the Farm Bill resurrected much of the

progress of the 1996 agriculture law). Senator McConnell asserted that the Farm Bill "sets U.S. agriculture policy back 10 years." *Id.* at S4029; *see also* 148 CONG. REC. E778 (daily ed. May 10, 2002) (statement of Rep. Biggert) (refusing to support the Farm Bill because it reflects a shift in principles from the 1996 Freedom to Farm Act). *See generally Dangerous Activities: Trade Disputes*, ECONOMIST, May 11, 2002 (explaining that the Farm Bill reintroduced a host of trade-distorting subsidies for U.S. farmers, which unraveled the progress made by the Federal Agriculture Improvement and Reform Act of 1996), *available at* LEXIS, News Library, ECON File; David E. Sanger, *Reversing Course, Bush Signs Bill Raising Farm Subsidies*, N.Y. TIMES, May 14, 2002, at A16 (contrasting the Farm Bill, which increased domestic subsidies by $83 billion over a ten-year period for a total of $190 billion, with the Freedom to Farm Act, through which lawmakers intended to decrease government payments to agricultural producers), *available at* LEXIS, News Library, NYT File.

3. Federal Agriculture Improvement and Reform Act of 1996 § 115 (amending the Food Security Act of 1985, specifying that "payment limitations," such as the total amount of direct payments to farmers, cannot exceed $40,000 per producer per year).

4. *See* 148 CONG. REC. E778 (daily ed. May 10, 2002) (statement of Rep. Biggert) (maintaining that the Freedom to Farm Act was an effort to gradually lessen farmers' support on domestic subsidies and allow the market to "dictate prices and production levels"); *see also* 148 CONG. REC. S4028 (daily ed. May 8, 2002) (statement of Sen. Bunning) (documenting that the Freedom to Farm Act moved U.S. agriculture policy toward a free-market approach by diminishing subsidies and giving farmers the "flexibility to plant crops that would allow them to make a decent living").

5. *See* Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 410 [hereinafter Agreement on Agriculture] (providing an agreement among WTO Member States to reduce the amount of domestic subsidies each Member provides to its agricultural producers), *available at* http://www.wto.org/english/docs_e/legal_e/14-ag.pdf (last visited Sept. 9, 2005); *id.* art. 6(3) (limiting U.S. spending on trade-distorting agricultural subsidies to $19.1 billion per year); *see also* Clete D. Johnson, Note, *A Barren Harvest for the Developing World? Presidential "Trade Promotion Authority" and the Unfulfilled Promise of Agriculture Negotiations in the Doha Round*, 32 GA. J. INT'L & COMP. L. 437, 456 (2004) (reporting that the Freedom to Farm Act reduced trade-distorting subsidies so that the U.S. Total Aggregate Measure of Support in 1998 was only $10.4 billion); *Dangerous Activities*, *supra* note 2 (explaining that the Freedom to Farm Act's phasing out of trade-distorting subsidies kept the United States well within the $19.1 billion limit, and that U.S. Total AMS was likely to decrease more under the

domestic subsidies and likely will result in the United States violating the Agreement on Agriculture.[6] In essence, the Farm Bill requires the United States Department of Agriculture ("USDA") to allocate subsidies to producers of certain crops in the form of "direct payments," in which the payment amount depends on the quantity of the crop the producer planted at some point in the past.[7] The Farm Bill also provides for "counter-cyclical payments," which the USDA distributes in addition to direct payments when crop prices fall.[8]

The WTO's Agreement on Agriculture, a product of the Uruguay Round of trade talks in 1994, aims to curb trade-distorting domestic

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Act); Frederick Nelson, *U.S. Ag Policy – Well Below WTO Ceilings on Domestic Support*, AGRIC. OUTLOOK, Oct. 1997, at 26-32 (listing actual and projected U.S. Total AMS under the 1996 Freedom to Farm Act, as well as under the limits imposed by the Agreement on Agriculture), *available at* http://www.ers.usda.gov/publications/agoutlook/oct1997/ao245h.pdf (last visited Sept. 9, 2005).

6. *See* 148 CONG. REC. S4137 (daily ed. May 9, 2002) (statement of Sen. Specter) (asserting that the Farm Bill's counter-cyclical payments will encourage overproduction and drive down prices, which will lead to more subsidies and may cause the United States to breach the Agreement on Agriculture); *see also* Gregor Kreuzhuber, *Questions & Answers – US Farm Bill* (May 15, 2002) (expecting the Farm Bill's counter-cyclical payments to cause a breach of U.S. obligations under the Agreement on Agriculture), *available through* http://www.agriculturalconvention.org/ (last visited Sept. 9, 2005); *Congress at the Trough*, CHI. TRIB, May 6, 2002, at 14 (arguing that the Farm Bill's subsidies will cause overproduction, which in turn will cause trade distortion), *available at* LEXIS, News Library, CHTRIB File; *Dangerous Activities*, *supra* note 2 (maintaining that the Farm Bill puts the United States at risk of breaking its commitments under the Agreement on Agriculture and that "America's commitment to freer trade looks laughable"); discussion *infra* Part II.A (demonstrating how the Farm Bill's counter-cyclical payments likely violate the Agreement on Agriculture because they cause overproduction and price suppression and are prone to expansion, thereby causing trade distortion and putting the United States at risk of spending more than the Agreement allows).

7. *See* Farm Security and Rural Investment Act of 2002 § 1103, 7 U.S.C.A. §§ 7901-7918 (West Supp. 2005) (providing that the Secretary of Agriculture must give direct payments to producers whose farms have set payment amounts and base acres); *see also* discussion *infra* Part I.A.1 (explaining the fundamentals of the direct payment system under the 2002 Farm Bill).

8. *See* Farm Security and Rural Investment Act § 1104 (specifying that the USDA must distribute counter-cyclical payments for a commodity if it determines that the commodity's target price exceeds its effective price); *see also* discussion *infra* Part I.A.2 (summarizing the purpose and method of counter-cyclical payment distribution).

subsidies.[9] Trade distortion occurs in the market when an agricultural producer's level of production or a commodity's price is higher or lower than it would be absent government interference.[10] Government payments to farmers that depend on the amount of crops the farmer produces or a crop's market price tend to cause overproduction of those commodities.[11] The surplus saturates the world market for that commodity, drives prices down, and adversely affects the producers of that commodity in other parts of the world.[12] The Agreement on Agriculture limits the United States to spending a maximum of $19.1 billion per year on trade-distorting agricultural subsidies.[13] In addition to Agreement on Agriculture restrictions, the

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9. *See* Agreement on Agriculture, *supra* note 5, art. 6 (providing that WTO Members must temper domestic support initiatives).

10. *See, e.g.*, WORLD TRADE ORG., UNDERSTANDING THE WTO 26 (2003) [hereinafter UNDERSTANDING THE WTO] (describing what trade distortion is, what causes it, and its common effects), *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf (last visited Sept. 9, 2005).

11. *See id.* at 28 (explaining that measures that bolster local prices or support production levels can lead to overproduction); *see also* Daniel T. Griswold, Farm Bill Follies, Presentation at Cato Institute Policy Forum (June 6, 2002) (maintaining that subsidies guaranteeing prices cause production levels to remain steady when the market indicates that production should fall), *at* http://www.freetrade.org/pubs/speeches/dg-060602.html (last visited Sept. 9, 2005).

12. *See* 148 CONG. REC. S4029 (daily ed. May 8, 2002) (statement of Sen. Bunning) (remarking that the Farm Bill's production incentives will result in subsidized crop overproduction, causing world prices of those commodities to fall); *see also* UNDERSTANDING THE WTO, *supra* note 10, at 28 (stipulating that the overproduction of commodities results in dumping of low-priced goods on the international market, which hurts developing countries); Daniel Altman, *Global Trade Looking Glass: Can U.S. Have It Both Ways?*, N.Y. TIMES, Nov. 9, 2002, at C1 (observing that critics of the Farm Bill predict that it will persuade farmers to overproduce, which in turn will weaken world prices for the overproduced goods), *available at* LEXIS, News Library, NYT File.

13. *See* Agreement on Agriculture, *supra* note 5, art. 6(3) (providing that a WTO Member State meets its domestic support reduction obligations if its agricultural domestic subsidies in any one year, measured as the Current Total Aggregate Measurement of Support ("Current Total AMS"), do not surpass the maximum amount); *see also* Press Conference, U.S. Trade Representative Robert Zoellick, USTR Zoellick Discusses the Successful Conclusion of Meetings of the WTO's General Council in Geneva, Switzerland (Aug. 1, 2004) [hereinafter Zoellick Press Conference], *at* http://www.ustr.gov/Document_Library/Transcripts/2004/August/Transcript_of_Press_Conference_with_USTR_Zoellick_At_the_Conclusion_of_WTO_General_Council_Meeting,_Geneva,_Switzerl.html

Agreement on Subsidies and Countervailing Measures ("SCM Agreement") invalidates subsidies that cause serious prejudice to the interests of any WTO Member.[14] A WTO panel recently ruled that U.S. cotton subsidies violate the SCM Agreement and suggested that all counter-cyclical payments under the Farm Bill are illegal.[15]

Since enacting the Agreement on Agriculture, the WTO has begun a new round of trade talks, the Doha Round, aimed at further reducing trade-distorting subsidies and tariffs.[16] However, the Round has been seriously delayed, partly because of the United States' insistence on maintaining its Farm Bill subsidies.[17] Recently, in

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(last visited Sept. 9, 2005); Johnson, *supra* note 5, at 454-55 (clarifying that the ceiling of $19.1 billion per year means that the United States has agreed to limit its Current Total AMS to this amount).

14. *See* Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, art. 5, 1869 U.N.T.S. 14 [hereinafter SCM Agreement] (stating that WTO Member States may not allow subsidies to injure "the domestic industry of another Member" or strongly influence another Member's interests), *available at* http://www.wto.org/english/docs_e/legal_e/24-scm.pdf (last visited Sept. 9, 2005).

15. *See* Panel Report, *United States—Subsidies on Upland Cotton*, at 350-51, WT/DS267/R (Sept. 8, 2004) [hereinafter WTO Report on U.S. Cotton Subsidies] (requiring the United States to "remove the adverse effects" of its counter-cyclical payments to cotton producers or withdraw them altogether), *available at* http://www.wto.org/english/tratop_e/dispu_e/267r_a_e.pdf (last visited Sept. 9, 2005).

16. *See* World Trade Organization, Ministerial Declaration of 14 November 2001, ¶ 13, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration] (reaffirming the Uruguay Round's commitment to "correct and prevent restrictions and distortions" in global agricultural trade), *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf (last visited Sept. 9, 2005). The declaration provided that the Doha Round's goals are "substantial improvements in market access; reductions of, with a view to phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support." *Id.*

17. *See Cancun's Charming Outcome: Breakdown in Cancun*, ECONOMIST, Sept. 20, 2003 (outlining the purpose of the Doha Trade Round, discussing the breakdown of talks in Cancun, Mexico, and analyzing its likely impact on global trade), *available at* LEXIS, News Library, ECON File. The original deadline for reaching an agreement in the Doha Round was January 1, 2005, but the failure of negotiations in September 2003 at the Fifth WTO Ministerial Conference in Cancun, Mexico greatly reduced the chance of meeting this goal. *Id.*; *see also* UNDERSTANDING THE WTO, *supra* note 10, at 91 (describing the division among WTO Members over agricultural issues at the ministerial conference in Cancun on September 10-14, 2003); *The WTO Under Fire – The Doha Round*, ECONOMIST,

Geneva, Switzerland, WTO Members made an agreement to adhere to certain principles in continuing Doha Round negotiations.[18] That decision included a framework ("Geneva Framework") to provide an underlying structure for a Doha Round agreement on agriculture.[19] The Farm Bill cannot withstand the provisions of the Geneva Framework and thus almost certainly will violate a final Doha Round agreement based on the Framework.[20]

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Sept. 20, 2003 (opining that the collapse at Cancun puts multilateral trade negotiations in peril and negates any possibility of the WTO achieving consensus by the original deadline), *available at* LEXIS, News Library, ECON File. The *Economist* attributed the blame for the breakdown of negotiations to both the rich and poor countries. *Id.* For instance, the United States was unwilling to curb its cotton subsidies, and many of the poorest countries made demands on the rich countries while doing nothing to lower their own trade barriers. *Id.*

18. *See* WTO Doha Work Programme, Decision Adopted by the General Council § 3, WT/L/579 (Aug. 2, 2004) [hereinafter Doha Decision] (calling on all WTO Member States to focus their efforts on reaching a final Doha Round agreement and promulgating a framework for agricultural and nonagricultural market access negotiations), *available at* http://www.wto.org/english/tratop_e/dda_e/ddadraft_31jul04_e.pdf (last visited Sept. 9, 2005). The Doha Decision specified that the new deadline for completion of negotiations is December 2005 at the Sixth WTO Ministerial Conference in Hong Kong, China. *Id.*; *see also* Press Release, World Trade Org., Supachai Welcomes Input from the Five as a Key First Step (July 29, 2004) [hereinafter Input from the Five] (noting that ministers from the United States, E.U., Australia, Brazil, and India met in Geneva from July 28-29, 2004, and agreed on some preliminary matters regarding a new agriculture agreement), *available at* http://www.wto.org/english/news_e/news04_e/dda_package_sum_28_29july04_e.htm (last visited Sept. 9, 2005); Press Release, World Trade Org., Round-the-Clock Meetings Produce "Historic" Breakthrough (July 31, 2004) [hereinafter Historic Breakthrough] (explaining that the WTO's 147 countries approved the Doha Decision in the early morning of Aug. 1, 2004), *available at* http://www.wto.org/english/news_e/news04_e/dda_package_sum_31july04_e.htm (last visited Sept. 9, 2005).

19. *See* WTO Doha Work Programme, Decision Adopted by the General Council, Annex A: Framework for Establishing Modalities in Agriculture, at A-1, WT/L/579 (Aug. 2, 2004) [hereinafter Geneva Framework] (calling for an abolition of all export subsidies, a substantial reduction in trade-distorting domestic subsidies, and lower tariffs to improve market access), *available at* http://www.wto.org/english/tratop_e/dda_e/ddadraft_31jul04_e.pdf (last visited Sept. 9, 2005).

20. *See* discussion *infra* Part II.B (demonstrating that the Farm Bill violates those provisions of the Geneva Framework that require a twenty percent decrease in allowable trade-distorting subsidies, reductions on blue box subsidies, and caps on product-specific support).

This Comment argues that Congress should repeal the Farm Bill and enact legislation that is consistent with the Agreement on Agriculture and the Geneva Framework.[21] Part I details relevant provisions of the Farm Bill, the Agreement on Agriculture, the Geneva Framework, and the WTO's recent decision on the legality of U.S. cotton subsidies regulated under the Farm Bill.[22] Part II applies the Agreement on Agriculture and the Geneva Framework to the Farm Bill and concludes that the legislation is inconsistent with these multilateral agreements.[23] Part III argues that Congress should repeal the Farm Bill because it violates world trade agreements.[24] Furthermore, Part III recommends that Congress enact a new agriculture law that is founded upon free-market principles and awards subsidies based on farmers' compliance with environmental measures instead of their production levels.[25]

## I. BACKGROUND

The Farm Bill requires the Secretary of Agriculture to distribute domestic subsidies to farmers in the form of direct and counter-cyclical payments.[26] However, the Agreement on Agriculture

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21. *See* discussion *infra* Part III (suggesting that Congress should repeal the Farm Bill for several legal and policy reasons and implement an agriculture bill dedicated to free market principles that rewards farmers for conservation measures).

22. *See* discussion *infra* Part I (providing background on the Farm Bill's direct and counter-cyclical payments, the provisions of the Agreement on Agriculture and the Geneva Framework relevant to the Farm Bill, and the WTO's decision to declare U.S. cotton subsidies illegal).

23. *See* discussion *infra* Part II (finding that the Farm Bill's counter-cyclical payments, but not its direct payments, likely violate the Agreement on Agriculture and the Geneva Framework).

24. *See* discussion *infra* Part III.A (recommending that Congress repeal the Farm Bill because it violates the Agreement on Agriculture and the Geneva Framework and hurts both domestic and international agricultural producers in the long term).

25. *See* discussion *infra* Part III.B (suggesting that the United States model a new farm bill after an E.U. policy that farmers should have income stability linked to their participation in environmental and conservational programs).

26. *See* Farm Security and Rural Investment Act of 2002 § 1103, 7 U.S.C.A. § 7913 (West Supp. 2005) (explaining the availability of direct payments to farmers). The Farm Bill also requires distribution of counter-cyclical payments to

restricts each Member State's allowable spending on trade-distorting domestic agriculture subsidies.[27] In 2003, Brazil brought a complaint to the WTO that U.S. cotton subsidies, which are regulated under the Farm Bill, breach the Agreement on Agriculture, and a WTO panel issued a ruling largely in favor of Brazil in September 2004.[28] On August 1, 2004, WTO Members agreed to a framework that calls for further reductions in domestic subsidies, which will serve as the basis for a new WTO agriculture agreement.[29]

## A. PROVISIONS OF THE FARM BILL OF 2002

### *1. Direct Payments*

The direct payment system mandates that the Secretary of Agriculture subsidize every farmer whose crops fall within the Farm Bill's coverage and who can establish that he planted and harvested those crops in the past.[30] The amount of a direct payment subsidy that a farmer who produces a covered crop will receive is the product of (1) the "payment acres" of the crop the farmer planted, (2) the amount of crop that those acres yielded, known as the "payment yield," and (3) a pre-specified amount of money the U.S. government will pay for each unit of crop produced, the crop's "payment rate."[31]

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agricultural producers of certain commodities that depend on crop production levels and market prices. *Id.* § 1104.

27. *See* Agreement on Agriculture, *supra* note 5, art. 6 (requiring each State to reduce its permitted levels of spending on trade-distorting domestic support); *see also* UNDERSTANDING THE WTO, *supra* note 10, at 28-29 (specifying that developed countries agreed to reduce the maximum amount that they may spend on trade-distorting domestic subsidies by twenty percent over six years).

28. *See* WTO Report on U.S. Cotton Subsidies, *supra* note 15, at 1 (stating that Brazil requested that a WTO panel investigate its allegation that U.S. subsidies to upland cotton producers violated the Agreement on Agriculture). The Dispute Settlement Body ("DSB") Panel found that some U.S. cotton subsidies are heavily trade-distorting and prejudicial to Brazil's interests. *Id.* at 349-50.

29. *See* Geneva Framework, *supra* note 19, § 18 (providing that a new agreement will contain an abolition on export subsidies and significant reductions in trade-distorting domestic subsidies and tariffs).

30. *See* Farm Security and Rural Investment Act § 1103 (requiring the Secretary of Agriculture to make direct payments to farmers during the years of 2002-2007 for the crops the agreement covers).

31. *Id.* § 1103(c). Payment rates during 2002-2007 for the commodities covered by the Farm Bill are: (1) wheat at $0.52 per bushel; (2) corn at $0.28 per

Payment acres are the number of acres equal to eighty-five percent of the actual acres of crop planted.[32] The payment yield for a crop under the direct payment system equals the amount of the crop the farmer produced in 1995, as opposed to the year when the farmer actually receives the subsidy.[33]

### 2. Counter-Cyclical Payments

The purpose behind the counter-cyclical payment system is to provide additional assistance to farmers when the demand for their crops has decreased and prices are low.[34] Accordingly, the Farm Bill requires the Secretary of Agriculture to distribute counter-cyclical payments if a crop's "effective price," or market price, has fallen

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bushel; (3) grain sorghum at $0.35 per bushel; (4) barley at $0.24 per bushel; (5) oats at $0.024 per bushel; (6) upland cotton at $0.0667 per pound; (7) rice at $2.35 per hundredweight; (8) soybeans at $0.44 per bushel; and (9) other oilseeds at $0.0080 per pound). *Id.* § 1103(b).

32. *See id.* § 1101(f) (defining payment acres in terms of base acres, or actual acres planted). An agricultural producer may select one of the following two methods for the Secretary to use in calculating the base acres of a crop: (1) the four-year average of the acreage of the crop planted during 1998-2001 plus the four-year average of any acreage on the farm that the farmer could not plant due to conditions beyond his control, such as a draught or flood; or (2) the sum of the acreage the Secretary of Agriculture used to distribute a payment in 2002 under the Freedom to Farm Act. *Id.* § 1101(a)(1)(A)-(B). However, if the farmer produces an oilseed crop, then the crop's number of base acres must equal the four-year average of eligible oilseed acreage on the farm during the 1998-2001 crop years. *Id.* § 1101(a)(1)(B)(ii).

33. *See id.* § 1102(b) (specifying that the payment yield of a crop for purposes of calculating a direct payment equals the yield of that crop in the 1995 harvest year). If a farm did not produce a certain crop in 1995 that the Farm Bill covers, then the Secretary will assign a payment yield to the crop according to the payment yield for that crop in 1995 on similar farms. *Id.* § 1102(c).

34. *See id.* § 1104 (explaining the conditions under which the USDA must distribute additional subsidies in the form of counter-cyclical payments); *see also* Altman, *supra* note 12 (expressing that the Farm Bill's counter-cyclical payments protect farmers from slumps in the business cycle, which critics say encourages farmers to overproduce); Press Release, White House, President Signs Farm Bill (May 13, 2002) [hereinafter President Signs Farm Bill] (contending that the Bill provides extra assistance to farmers "when times are tough"), *at* http://www.whitehouse.gov/news/releases/2002/05/20020513-2.html (last visited Sept. 9, 2005).

below a pre-determined "target price" for that crop.[35] If the Secretary determines that a commodity's market price is too low, then he or she will distribute counter-cyclical subsidies to farmers in an amount that is equal to the product of (1) the number of payment acres of the crop, (2) the payment yield of the crop, and (3) the payment rate for the crop, which is the difference between the effective and target prices.[36] The Secretary calculates payment acres in the same way as under the direct payment system, which provides that they are equal to eighty-five percent of the actual acres of crops planted.[37] However, calculation of the payment yield of a crop differs for counter-cyclical payments due to the producers' option to "partially update" their payment yields to reflect crop production in 1998-2001 as opposed to crop production in 1995, which is used to calculate direct payments.[38] This difference is significant because it demonstrates

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35. *See* Farm Security and Rural Investment Act § 1104(a) (illustrating that the purpose behind the counter-cyclical payments is to compensate for market fluctuations). The "effective price" of a crop is the payment rate for the purpose of making direct payments with respect to that crop plus the higher of the following: (1) the national average market price during the twelve month marketing year for the crop, or (2) the national average loan rate for a marketing assistance loan for the covered commodity. *Id.* § 1104(b). The target prices for covered crops from 2004-2007 are as follows: (1) wheat at $3.92 per bushel; (2) corn at $2.63 per bushel; (3) grain sorghum at $2.57 per bushel; (4) barley at $2.24 per bushel; (5) oats at $1.44 per bushel; (6) upland cotton at $0.7240 per pound; (7) rice at $10.50 per hundredweight; (8) soybeans at $5.80 per bushel; and (9) other oilseeds at $0.1010 per pound. *Id.*

36. *See id.* § 1104(e) (promulgating the recommended formula to use in determining the amount of a counter-cyclical payment). Payment rates and, therefore, the amount of counter-cyclical payments, depend on market fluctuations. *Id.* § 1104(d).

37. *See id.* § 1101(a)-(f) (specifying how the Secretary calculates base acres and payment acres for both direct payments and counter-cyclical payments).

38. *See id.* § 1102(b) (describing "payment yield" for a covered crop for purposes of direct and counter-cyclical payments as the amount of the crop produced in 1995); *see also id.* § 1102(e) (allowing producers to partially update the crop yields for purposes of counter-cyclical payments). The Farm Bill provides two methods a producer may use in calculating an updated payment yield for a crop. *Id.* § 1102(e)(3). First, an updated yield can be equal to the sum of (a) the payment yield applicable to direct payments, and (b) seventy percent of the difference between the payment yield for direct payments and the average yield per planted acre of the crop during the 1998-2001 crop years. *Id.* § 1102(e)(3)(A). Second, a farmer can choose an updated crop payment yield as equal to ninety-

that counter-cyclical payments take into account much more recent crop production levels than direct payments.[39]

### B. THE AGREEMENT ON AGRICULTURE

The Agreement on Agriculture is one component of the Marrakesh Agreement Establishing the World Trade Organization, signed in April 1994.[40] The Agreement on Agriculture's long-range goal is "to establish a fair and market-oriented agricultural trading system."[41] The Agreement sets forth specific goals of expanding market access by requiring reduction of tariffs, decreasing the amount of and expenditures on subsidized exports, and reducing Members' spending on trade-distorting domestic subsidies.[42]

Article Six of the Agreement on Agriculture, which discusses domestic support commitments, mandates that each WTO Member State must not provide trade-distorting domestic subsidies to its agricultural producers in excess of a maximum amount that is specific to each State.[43] The maximum amount of funds that the

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three and one-half percent of the average yield per planted acre of the crop over the 1998-2001 crop years. *Id.* § 1102(e)(3)(B).

39. *See* discussion *infra* Part II.A.2 (explaining that using more current production levels in calculating counter-cyclical payments contributes to the trade-distorting character of these subsidies).

40. *See* Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter WTO Agreement] (establishing a single institution to govern international trade, which encompasses the General Agreement on Tariffs and Trade and many other agreements), *available at* http://www.wto.org/english/docs_e/legal_e/04-wto.pdf (last visited Sept. 9, 2005).

41. Agreement on Agriculture, *supra* note 5, pmbl. (stating further that the Agreement's long-term objectives aim to reduce and prevent restrictions in international trade and measures that distort world agricultural markets).

42. *See id.* (specifying that the parties to the Agreement have committed to improving market access and reducing domestic support and export competition); *see also* Carmen G. Gonzalez, *Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries*, 27 COLUM. J. ENVTL. L. 433, 452-53 (2002) (providing an overview of the major provisions of the Agreement on Agriculture); UNDERSTANDING THE WTO, *supra* note 10, at 29-31 (explaining the basic reduction commitments contained in the Agreement).

43. *See* Agreement on Agriculture, *supra* note 5, art. 6(3) (stating that a Member State remains in compliance with the Agreement so long as its Current Total AMS does not exceed the country's "final bound commitment level"). The sum of a country's domestic support to agricultural producers constitutes that

United States may spend on trade-distorting agricultural subsidies under the Agreement on Agriculture is $19.1 billion.[44] The total amount of trade-distorting support that the U.S. government actually distributes in a year is termed its Current Total Aggregate Measurement of Support ("Current Total AMS").[45] To comply with the Agreement on Agriculture, the U.S. Current Total AMS must be less than the Allowed Total Aggregate Measurement of Support ("Allowed Total AMS") of $19.1 billion per year.[46]

The WTO divides subsidies into different "boxes" in order to illustrate the amount of relative trade distortion the subsidies cause.[47] The agricultural subsidies that are the most trade-distorting are called

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country's "Total Aggregate Measurement of Support," or "Total AMS," and the sum of domestic support that a country provides during any one year is called "Current Total AMS." *Id.* art. 1(h). A Member State calculates its final bound commitment level in relation to the country's "Base Total AMS," which is the total amount of trade-distorting agricultural subsidies the country allocated to its producers during the base period of 1986-88. *Id.* Annex 3; *see also* UNDERSTANDING THE WTO, *supra* note 10, at 28-29 (clarifying that developed countries agreed to reduce trade-distorting domestic subsidies by twenty percent over six years, using the amount of domestic support the countries provided in 1986-1988 as base years).

44. *See* Zoellick Press Conference, *supra* note 13; *see also* World Trade Org., *Agriculture Negotiations: Background Fact Sheet, Domestic Support in Agriculture* [hereinafter Domestic Support Boxes] (providing that a country's maximum amount of permitted subsidies is also known as its Allowed Total Aggregate Measurement of Support), *at* http://www.wto.org/english/tratop_e/agric_e/agboxes_e.htm (last visited Sept. 9, 2005).

45. *See* Agreement on Agriculture, *supra* note 5, art. 6(3) (defining Current Total AMS as a country's total amount of trade-distorting domestic support measures allocated to agricultural producers in a given year); *see also* Gonzalez, *supra* note 42, at 457 (explaining that Current Total AMS provides the measure of a country's compliance with the Agreement on Agriculture).

46. *See* Agreement on Agriculture, *supra* note 5, Annex 3 (detailing the method by which a country must calculate its Current Total AMS); *see also* Zoellick Press Conference, *supra* note 13 (specifying that the U.S. Allowed Total AMS equals approximately $19.1 billion per year).

47. *See* Agreement on Agriculture, *supra* note 5, art. 6 (distinguishing subsidies that Member States do not have to reduce from those that count towards a country's Allowed Total AMS); *see also* Domestic Support Boxes, *supra* note 44 (facilitating an understanding of the Agreement on Agriculture by characterizing subsidies as falling into different boxes).

"amber box" supports.[48] "Blue box" supports are less trade-distorting than amber box subsidies because they require recipients of the subsidy to limit the amount of crops they produce.[49] In contrast to amber and blue box supports, "green box" subsidies have minimal or no trade-distorting effects.[50] The Agreement on Agriculture does not require Member States to reduce the amount of any domestic subsidies except for amber box subsidies,[51] which are the only subsidies that count toward a Member State's spending limit.[52] Since the U.S. Allowed Total AMS is $19.1 billion, the total amount of amber box support the United States may spend is also $19.1 billion.[53]

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48. *See* Agreement on Agriculture, *supra* note 5, art. 6(4) (specifying that the most trade-distorting domestic subsidies, with certain *de minimis* exceptions, fall into the amber box). Trade-distorting subsidies are *de minimis* and, therefore, do not fall into the amber box when (1) product-specific domestic support does not exceed five percent of the total value of production of that specific product during the relevant year, and (2) non-product-specific support amounts to no greater than five percent of the value of the Member's total agricultural production. *Id.*

49. *See id.* art. 6(5) (recognizing an exception for trade-distorting subsidies that require agricultural producers to limit production). These blue box supports, which do not count toward a Member State's limit, are "[d]irect payments under production-limiting programmes" that also are (1) based on fixed area and yields, (2) made on eighty-five percent or less of the base level of production, or (3) livestock payments that are made on a fixed number. *Id.*

50. *See id.* Annex 2. A subsidy falls into the green box if it (1) comes from a publicly-funded government program not involving transfers from consumers, and (2) does not have the effect of providing price support to producers. *Id.*

51. *See* Domestic Support Boxes, *supra* note 44 (explaining that Members must reduce "amber box" subsidies but do not have to reduce "blue box" or "green box" subsidies). Each WTO Member State may spend a fixed amount of amber box support on its agriculture producers. *See id.*

52. *See* Johnson, *supra* note 5, at 455 (noting that amber box subsidies count against a Member State's Allowed Total AMS); *see also* Domestic Support Boxes, *supra* note 44 (demonstrating that a Member's Current Total AMS represents the amount of amber box subsidies that the Member has spent).

53. *See* Johnson, *supra* note 5, at 454-55 (explaining that a limit of $19.1 billion per year means that the United States has agreed to limit its Current Total AMS to this amount); *see also* Zoellick Press Conference, *supra* note 13.

### C. THE WTO RULING ON U.S. COTTON SUBSIDIES AND THE SCM AGREEMENT

In September 2002, Brazil filed a complaint with the WTO Dispute Settlement Board ("DSB")[54] alleging that U.S. cotton subsidies, which are regulated under the Farm Bill, are heavily trade-distorting and violate WTO agreements.[55] The Agreement on Agriculture includes a "peace clause," which states that during the implementation period of the Agreement, a WTO Member may not file a complaint regarding another Member State's domestic subsidies unless the State has spent more on subsidies for a given commodity per year than the State spent on subsidies for that commodity during the 1992 marketing year.[56] First, Brazil contended

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54. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, art. 6, 33 I.L.M. 1225, 1226 (1994) [hereinafter Dispute Settlement Understanding] (establishing that if a Member requests that a panel review a matter, the DSB may elect to establish a panel at its next meeting), *available at* http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf (last visited Sept. 9, 2005).

55. *See* WTO Report on U.S. Cotton Subsidies, *supra* note 15, at 1-2 (describing Brazil's allegation that U.S. subsidies on upland cotton were in violation of the Agreement on Agriculture, the SCM Agreement, and other WTO agreements). The Brazil Government requested consultation with the U.S. government in September 2002 regarding certain subsidies provided to U.S. producers, users, and exporters of upland cotton and the laws governing those subsidies. *Id.* at 1. The two governments met for several consultations but were unable to settle the dispute. *Id.* Therefore, Brazil requested that the WTO establish a DSB Panel to examine the matter pursuant to the Dispute Settlement Understanding, Article 6, and the Agreement on Agriculture, Article 19. *Id.* at 1; *see also* Agreement on Agriculture, *supra* note 5, art. 19 (providing that the Dispute Settlement Understanding governs the settlement of disputes under this Agreement). *See generally Unpicking Cotton Subsidies*, ECONOMIST, Apr. 30, 2004 (documenting that Brazil was the first WTO Member to challenge a rich country's agriculture subsidies), *available at* http://www.economist.com/agenda/displaystory.cfm?story_id=2626900 (last visited Sept. 9, 2005).

56. *See* Agreement on Agriculture, *supra* note 5, art. 13(b)(iii) (stating that domestic support measures that fully conform to the Agreement shall receive exemption from actions filed by other Members "provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year"); *see also* Press Release, Office of the U.S. Trade Representative, WTO Panel Issues Mixed Verdict in Cotton Case (Sept. 8, 2004) [hereinafter Mixed Verdict] (describing that the purpose of the peace clause was to prevent WTO Members from challenging subsidy measures during the Agreement on Agriculture's implementation period), *at* http://www.ustr.gov/Document_Library

that the peace clause does not exempt U.S. domestic subsidies on cotton from a challenge because the United States has spent more on cotton subsidies in recent years than it spent in 1992.[57] Second, Brazil alleged that U.S. cotton subsidies violate the SCM Agreement because they have caused, and continued to cause, "serious prejudice" to Brazil's interests by depressing world markets for upland cotton.[58] The United States maintained that the Farm Bill's payments to cotton producers are immune from attack because they do not exceed levels of cotton subsidies provided to farmers in 1992 and, in any case, do not cause serious prejudice to Brazil's interests.[59]

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/Press_Releases/2004/September/WTO_Panel_Issues_Mixed_Verdict_in_Cotton_Case_printer.html (last visited Sept. 9, 2005).

57. *See* WTO Report on U.S. Cotton Subsidies, *supra* note 15, at 2-3 (expressing Brazil's request that the DSB Panel find that U.S. domestic support measures for upland cotton during the 1999-2002 marketing years violated the Agreement on Agriculture under the authority of the peace clause); *see also A Knotty Problem: America and the WTO*, ECONOMIST, May 1, 2004 (reporting that Brazil filed a formal complaint against the United States in September 2002, alleging that U.S. cotton subsides are not immune from challenge under the peace clause), *available at* LEXIS, News Library, ECON File.

58. *See* WTO Report on U.S. Cotton Subsidies, *supra* note 15, at 3 (urging the DSB Panel to find that the subsidies cause suppression of upland cotton prices in the U.S., Brazilian, and world markets, and that this constitutes serious prejudice to Brazil's interests in violation of SCM Articles 5(c) and 6.3). Brazil also claimed that the subsidies cause the United States to have a market share in upland cotton that causes serious prejudice to Brazil's interests in violation of the SCM Agreement. *Id.* at 4; *see also* SCM Agreement, *supra* note 14, art. 5(c) (providing that no Member State may allow its subsidies to cause serious prejudice to the interests of another Member). Article 6.3 describes situations that constitute "serious prejudice." *Id.* art. 6.3.

59. *See* WTO Report on U.S. Cotton Subsidies, *supra* note 15, at 6-7 (contending that U.S. cotton supports are exempt from legal challenge because they fall within the parameters of the peace clause). The United States submitted that, if the Panel found that the subsidies do not meet the criteria of the peace clause, the subsidies are only minimally trade-distorting and, therefore, do not unfairly prejudice Brazil. *Id.*; *see also Unpicking Cotton Subsidies*, *supra* note 55 (explaining the U.S. position that cotton farmers receive counter-cyclical payments according to the number of acres planted and the amount of cotton produced in the past and, therefore, do not tempt farmers to overproduce and consequently depress world prices for cotton).

The investigating DSB Panel concluded that U.S. cotton subsidies are not exempt from challenge under the peace clause.[60] Furthermore, the Panel agreed with Brazil in finding that U.S. counter-cyclical payments to cotton producers violate the SCM Agreement because they cause significant price suppression and serious prejudice to Brazil's interests.[61] As a remedy, the DSB Panel required the United States to remove the subsidies' adverse effects or withdraw them altogether.[62] The current general consensus in the WTO is that the peace clause has expired, so a Member challenging U.S. subsidies in the future probably would not have to show that the United States spends more on subsidies for the crop in question than it spent in 1992.[63]

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60. *See* WTO Report on U.S. Cotton Subsidies, *supra* note 15, at 348 (ruling that U.S. cotton subsidies during the marketing years 1999-2002 exceeded the amount of subsidies the United States distributed during the 1992 marketing year); *see also Unpicking Cotton Subsidies*, *supra* note 55 (reporting that the United States paid cotton producers $1.62 billion in 1992, in contrast to $2.3 billion in 1999 and $2.06 billion in 2001).

61. *See* WTO Report on U.S. Cotton Subsidies, *supra* note 15, at 349 (finding that "mandatory price-contingent United States subsidy measures" on upland cotton, such as counter-cyclical payments, cause serious prejudice to Brazil in violation of Articles 5(c) and 6.3(c) of the SCM Agreement). However, the Panel decided that Brazil failed to establish that U.S. direct payments to cotton producers cause significant price suppression in the world agriculture market. *Id.* at 349-50. Additionally, Brazil did not adequately prove that the counter-cyclical payments significantly increase the U.S. world market share of cotton in violation of the SCM Agreement. *Id.*

62. *See id.* at 350-51 (demanding, pursuant to Article 7.8 of the SCM Agreement, that the United States implement remedial measures to correct the prejudice the subsidies have caused); *see also* Mixed Verdict, *supra* note 56 (quoting former U.S. Trade Representative Zoellick as saying that the United States strongly disagrees with some aspects of the WTO ruling, such as the finding that U.S. domestic cotton subsidies distort trade by depressing world cotton prices, and that the United States will appeal); *Unpicking Cotton Subsidies*, *supra* note 55 (recognizing that the ruling is not final and the United States plans to appeal). Even if the Appellate Body confirms the ruling, the United States may act slowly in implementing the Panel's recommendations. *Id.*

63. *See Unpicking Cotton Subsidies*, *supra* note 55 (reporting that most WTO countries agree that the peace clause has expired). The *Economist* found that the "legal cover" protecting rich countries' subsidies no longer exists with the peace clause's expiration. *Id.*

## D. THE GENEVA FRAMEWORK

The Geneva Framework represents a consensus among the WTO Member States as to the general provisions the new agreement on agriculture will entail.[64] Although it leaves many details for further negotiation, the Framework calls for substantial reductions in trade-distorting domestic subsidies by all Members.[65] Under the Framework, wealthy countries like the United States and the European Union ("E.U.") agreed to reduce their Allowed Total AMS levels by twenty percent during the first year following a final Doha Round agreement.[66] Also, the Framework stipulates that countries

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64. *See* Geneva Framework, *supra* note 19, ¶¶ 6, 17, 29 (calling for an abolition of all export subsidies, substantial reductions in trade-distorting domestic subsidies, and decreases in tariffs to improve market access); *see also* Office of the U.S. Trade Representative, Trade Facts: Charting a Course to Prosperity: WTO Agrees on a Detailed Plan to Open Markets, Expand Trade (July 31, 2004) (outlining the substance of the Geneva Framework and explaining that the Framework proposes caps on support levels for specific commodities as well as cuts in overall levels of trade-distorting support), *available at* http://www.ustr.gov/assets/Document_Library/Fact_Sheets/2004/asset_upload_file 505_5635.pdf (last visited Sept. 9, 2005). *See generally Now Harvest It: World Trade,* ECONOMIST, Aug. 5, 2004 (noting that the Geneva Framework saved the Doha Round of talks from collapse and analyzing the Framework's provisions), *available at* LEXIS, News Library, ECON File.

65. *See* Geneva Framework, *supra* note 19, ¶ 6 (deciding that, in order to achieve these substantial reductions, a new agreement will subject higher levels of permitted trade-distorting domestic support to deeper cuts, mandate that each developed Member State make a substantial reduction in the overall level of its trade-distorting support from bound levels, and subject previously permitted *de minimis* support to substantial reductions). The General Council decided to calculate domestic subsidy reduction commitments for each country using a tiered formula in which Members that spend the most on trade-distorting subsidies will make the greatest reductions. *Id.* ¶ 7.

66. *See id.* (providing that during the first year following completion of the Doha Round, each Member's total trade-distorting domestic support must not exceed eighty percent of the current levels). A state's "overall" amount of trade-distorting support is distinct from its Current Total AMS because "overall" support is the sum of Total AMS plus *de minimis* levels of trade-distorting support that do not count as part of a country's Total AMS. *Id.*; *see also* Elizabeth Becker, *Interim Trade Triumph Short on Hard Details*, N.Y. TIMES, Aug. 2, 2004, at C1 (observing that the United States agreed to make a twenty percent reduction in its corn, wheat, rice, and soybean subsidies), *available at* LEXIS, News Library, NYT File; *Now Harvest It*, *supra* note 64 (finding that the agreed-upon twenty percent cut may be misleading because it applies to the total amount of subsidies currently allowed rather than actual amounts spent).

must cap trade-distorting support for specific products at their respective average levels.[67] Additionally, a final Doha Round agreement will mandate substantial reductions in *de minimis* levels of trade-distorting subsidies[68] and will continue to provide developing countries special and differential treatment.[69]

## II. ANALYSIS

### A. FARM BILL SUBSIDIES LIKELY VIOLATE THE AGREEMENT ON AGRICULTURE

The Farm Bill's counter-cyclical payments likely violate the Agreement on Agriculture because they are highly trade-distorting and their amounts are unpredictable.[70] In contrast, the Farm Bill's

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67. *See* Geneva Framework, *supra* note 19, ¶ 9 (explaining that caps on product-specific AMS are necessary in order to prevent a country from decreasing domestic support for some commodities but increasing support for other commodities).

68. *See id.* ¶¶ 6, 11 (calling for a reduction in *de minimis* support as a separate requirement from reduction in Allowed Total AMS). The Framework exempts developing countries that distribute *de minimis* support almost exclusively for "subsistence and resource-poor farmers" from reduction requirements. *Id.* ¶ 11; *see also Domestic Support Boxes*, *supra* note 44 (explaining that *de minimis* trade-distorting support does not count towards Members' Current Total AMS, although it does contribute to overall totals of trade-distorting domestic support).

69. *See* Geneva Framework, *supra* note 19, ¶ 6 (permitting developing countries more time to implement mandatory reductions and allowing them to have more lenient reduction commitments for all types of trade-distorting domestic support). The Framework also calls for a limit on blue box subsidies, which require agricultural producers to limit production. *See id.* ¶¶ 6, 13-15 (enumerating that blue box support may not exceed five percent of a Member State's average total value of agricultural production during a historical period); *see also Domestic Support Boxes*, *supra* note 44 (explaining that the Agreement on Agriculture does not limit Member States' spending on blue box subsidies).

70. *See* discussion *infra* Part II.A.2 (finding that counter-cyclical payments are highly trade-distorting because they are linked to both a commodity's current production and its price). Since the total cost of these subsidies over time is unpredictable, the United States could easily spend more on subsidies than the Agreement on Agriculture allows. *Id. See generally* UNDERSTANDING THE WTO, *supra* note 10, at 28 (explaining that trade distortion occurs when subsidies encourage over-production of goods either because the amount of subsidies distributed are linked to current production levels or to current market prices). In other words, a subsidy is trade-distorting if it tends to cause farmers to produce more of a commodity than they otherwise would. *Id.*

direct payments are probably not a violation of the Agreement because they do not appear to be trade-distorting.[71]

The Agreement on Agriculture allows the United States to spend up to $19.1 billion on amber box supports per year.[72] Under the 1996 Freedom to Farm Act, the United States' spending on trade-distorting subsidies was approximately $10.4 billion per year.[73] In contrast, the Farm Bill's counter-cyclical payments increased spending on highly trade-distorting subsidies by an average of $8.28 billion per year, making the total amount the United States spends on amber box subsidies per year dangerously close to the $19.1 billion limit.[74]

*1. The Farm Bill's Direct Payments Are Not Trade-Distorting*

The Farm Bill's direct payments are probably not trade-distorting because they do not appear to be dependent on current price or production levels.[75] Because the value of a crop's payment acres equals a percentage of the amount of acres that the producer planted at a point in the past, there is no link between payment acres and

71. *See* discussion *infra* Part II.A.1 (asserting that the amount of a direct payment is not dependent on a farmer's current level of production of a commodity or on the current market price of the commodity).

72. *See* Zoellick Press Conference, *supra* note 13.

73. *See* Johnson, *supra* note 5, at 456 (finding that the 1996 Freedom to Farm Act greatly reduced trade-distorting subsidies, cutting the U.S. Total AMS to about half of its allowable support); *see also* Gonzalez, *supra* note 42, at 467 (explaining that the Freedom to Farm Act replaced trade-distorting subsidies with payments to producers that were decoupled from prices and production levels).

74. *See* 148 CONG. REC. S4137 (daily ed. May 9, 2002) (statement of Sen. Specter) (revealing that the Farm Bill's counter-cyclical payments will cost $82.8 billion over ten years, causing the approximate total of agricultural subsidies over the next decade to reach approximately $190 billion—an average of $19 billion per year); *see also* Johnson, *supra* note 5, at 442 (noting that the Farm Bill caused U.S. domestic agricultural subsidies to increase by approximately eighty percent); Sanger, *supra* note 2 (clarifying that the Farm Bill's agricultural subsidies are in addition to agricultural subsidies already in place); Brian M. Riedl, *Top 10 Reasons to Veto the Farm Bill*, at 2 (The Heritage Found., Backgrounder No. 1538, 2002) (asserting that the Farm Bill will cause the United States to spend approximately $191 billion over ten years), *at* http://www.heritage.org/Research/Agriculture/ BG1538.cfm (last visited Sept. 9, 2005).

75. *See infra* notes 76-78 and accompanying text.

current production levels.[76] Similarly, there is no tie between the payment yield and current production levels because the payment yield is equal to the amount of the commodity the producer planted per acre in 1995, as opposed to the most recent crop years.[77] Finally, since the payment rates remain constant rather than fluctuating based on current market prices, the direct payments are not tied to current price levels.[78]

### 2. *The Farm Bill's Counter-Cyclical Payments Are Highly Trade-Distorting and Likely Violate the Agreement on Agriculture*

The Farm Bill's counter-cyclical payments are the primary reason that U.S. agricultural subsidies may violate the Agreement on Agriculture.[79] Counter-cyclical payments are highly trade-distorting because they differ from direct payments in two important respects: the payment yield can be "partially updated" to reflect more current production levels, and the payment rate fluctuates with market prices rather than remaining constant.[80]

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76. *See* Farm Security and Rural Investment Act of 2002 § 1101(a)(1), 7 U.S.C.A. § 7911(a)(1) (West Supp. 2005) (providing that the amount of a crop's base acres depends on either: (a) the average acreage the farmer planted, or would have planted between 1998-2001, if it were not for a natural disaster, or (b) the amount of payment acres the Secretary of Agriculture used to calculate subsidies in 2002). The number of payment acres equals eighty-five percent of the number of base acres. *Id.* § 1101(f).

77. *See id.* § 1102(b). If the farmer did not produce the crop in question in 1995, the Secretary of Agriculture will assign a payment yield to the crop according to the payment yield for that crop on similar farms in 1995. *Id.* § 1102(c).

78. *See id.* § 1103(b) (stating that payment rates for direct payments are set at specific amounts and do not change depending on current market prices for crops); *see also* Griswold, *supra* note 11 (implying that domestic subsidies with payment amounts that are not dependent on levels of production and are independent of market prices do not tend to promote overproduction of covered commodities).

79. *See id.* § 1104 (establishing that the U.S. government must pay farmers counter-cyclical payments when the market price for a covered crop falls below the crop's target price); *see also* 148 CONG. REC. S4029 (daily ed. May 8, 2002) (statement of Sen. McConnell) (arguing that the counter-cyclical payments' target prices constitute price guarantees, which promote overproduction of crops); Griswold, *supra* note 11 (citing the international condemnation of the U.S. Farm Bill).

80. *See* Farm Security and Rural Investment Act § 1104(d) (establishing that the payment rate for a commodity under the counter-cyclical system depends on

The fact that an agricultural producer may use payment yields that are much closer in time to current production levels demonstrates that counter-cyclical payments are much more closely tied to current levels of production than are direct payments.[81] Where a farmer receives more subsidies for producing more crops, as he does under the counter-cyclical payment system, he will be inclined to produce more than he otherwise would.[82] This overproduction saturates world markets for the crops, causing crop prices to be lower than they otherwise would be, and stimulates the need for more subsidies to compensate for the low prices.[83]

Since the payment rate for counter-cyclical payments changes with market fluctuations, allowing producers to receive more money as crop prices decrease, counter-cyclical payments are dependent upon current market prices.[84] The fact that counter-cyclical payments are

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market fluctuations and, therefore, is linked to current price levels). Recipients of counter-cyclical payments may adjust payment yields to reflect more current crop yields. *Id.* § 1102(e). *See generally supra* notes 77-78 and accompanying text (finding that direct payments are not highly trade-distorting because the payment rates and payment yields used to calculate the amount of the subsidy are not linked to current price or production levels).

81. *See* Farm Security and Rural Investment Act § 1102(e)(3) (explaining that the agricultural producer may choose one of two ways in which to partially update crop payment yields, both of which take into account the average yields for the crops during the 1998-2001 crop years). In contrast, the crop yields for direct payments are based on the crop yields the farmer produced in 1995. *Id.* § 1102(b).

82. *See* 148 CONG. REC. S4036 (daily ed. May 8, 2002) (statement of Sen. Corzine) (indicating that the counter-cyclical payments will naturally lead to overproduction, distorting the world market in agriculture and benefiting only a limited number of the United States' largest producers); *see also* Riedl, *supra* note 74, at 4 (arguing that government subsidies that increase as producers plant more crops, like the counter-cyclical payments, create overproduction). *See generally* UNDERSTANDING THE WTO, *supra* note 10.

83. *See Dangerous Activities*, *supra* note 2 (finding that the Farm Bill invents new subsidies on a host of farm commodities that depend on prices and production levels and, therefore, are highly trade-distorting); *see also* Riedl, *supra* note 74, at 5 (pointing out that overproduction leads to depressed prices, which causes farmers to ask for more subsidies); UNDERSTANDING THE WTO, *supra* note 10, at 28 (explaining that, where there is a surplus of a commodity on the world market, prices for that commodity fall, which hurts other producers of that commodity around the world). *But see* Sanger, *supra* note 2 (quoting President Bush as claiming that the Farm Bill does not encourage overproduction or depress prices).

84. *See* Farm Security and Rural Investment Act § 1104(d) (providing that the payment rate for counter-cyclical payments is equal to the difference between the

linked to current crop prices has two important consequences.[85] First, a system that grants farmers more money to produce a crop when that crop's market price falls effectively constitutes a price-guarantee for the farmers, which encourages them to produce more of a crop precisely when they otherwise would produce less.[86] This overproduction naturally causes further depression of that crop's market price, which hurts producers of the crop globally.[87] Second, counter-cyclical payments often can become unpredictable and volatile since they are linked to an inherently fluctuating market.[88] Although the U.S. Current Total AMS under the Farm Bill may be

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crop's effective price and its target price). The payment rate is variable and dependent on market prices because the effective price of a crop depends on either the national average market price or the national average marketing assistance loan rate for the crop. *Id.* § 1104(b). As a crop's market price decreases in value, the difference between the market price and target price specified in the Farm Bill must increase, thereby increasing the amount of the subsidy that the Secretary of Agriculture must pay to the crop's producers. *Id.* § 1104(a)-(d).

85. *See infra* notes 86-87 and accompanying text (showing that counter-cyclical payments cause trade distortion and unpredictable subsidy payments).

86. *See* 148 CONG. REC. S4029 (daily ed. May 8, 2002) (statement of Sen. McConnell) (arguing that the counter-cyclical payments' "target prices" function as agricultural producers' price guarantees). Senator McConnell pointed out that guaranteeing payments on crops logically encourages farmers to overproduce those crops. *Id.*; *see also* Griswold, *supra* note 11 ("In a normal market, supply would contract when prices fall, but the farm bill is explicitly written to keep farmland in production even when the market is sending the opposite signal."); Kreuzhuber, *supra* note 6, at 3 (contending that when subsidies guarantee a given level of income, farmers have no incentive to follow market signals).

87. *See* 148 CONG. REC. S4029 (daily ed. May 8, 2002) (statement of Sen. Bunning) (warning that the overproduction incentives in the Farm Bill will cause the prices of those commodities to fall). The decrease in prices of the commodities on the global market will have an adverse economic affect on other nations, especially developing nations. *Id.* at S4036 (statement of Sen. Corzine); *see also* Griswold, *supra* note 11 (maintaining that overproduction resulting from price guarantees leads to depression in global prices, which particularly hurts farmers in third world countries).

88. *See* Farm Security and Rural Investment Act § 1104(a)-(d) (illustrating that, because market prices are unpredictable and the distribution of counter-cyclical payments is mandatory, the amount of subsidies the U.S. government must distribute to producers under the counter-cyclical system is also unpredictable); *see also* Johnson, *supra* note 5, at 457 (suggesting that the United States could fail to keep Farm Bill subsidies within the U.S. Allowed Total AMS).

just under $19.1 billion in theory,[89] the reality is that counter-cyclical payments potentially could expand, causing the U.S. government to spend more than it anticipated on trade-distorting subsidies and, therefore, breach the Agreement on Agriculture.[90] Members of Congress were correct to warn that because the subsidies are linked to current prices, they cause trade distortion and easily could result in a breach of U.S. obligations under the Agreement on Agriculture.[91]

The Bush Administration incorrectly asserts that the Farm Bill does not adversely affect world trade in agriculture or violate the Agreement on Agriculture.[92] The White House reasons that the counter-cyclical payments are in accordance with the Agreement on Agriculture because the Farm Bill contains a provision allowing the Secretary of Agriculture to adjust the amount of subsidies distributed, "to the maximum extent practicable," if the Secretary determines that U.S. expenditures on subsidies may rise above the

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89. *See supra* note 74 and accompanying text (explaining that under the Farm Bill, U.S. spending on amber box subsidies is dangerously close to the $19.1 billion annual limit).

90. *See* 148 CONG. REC. S4137 (daily ed. May 9, 2002) (statement of Sen. Specter) (pointing out that, despite the Farm Bill's theoretical compliance with the Agreement on Agriculture, the Farm Bill will breach the Agreement because it provides for "expanded and unpredictable levels of support"); *see also* Kreuzhuber, *supra* note 6, at 5 (noting that spending on counter-cyclical payments is unpredictable and likely will be higher than estimated).

91. *See, e.g.*, 148 CONG. REC. S4137 (daily ed. May 9, 2002) (statement of Sen. Specter) (asserting that the counter-cyclical payments will encourage overproduction, which will drive down prices, which leads to more subsidies, and this may cause the United States to breach the Agreement on Agriculture); 148 CONG. REC. S4030 (daily ed. May 8, 2002) (statement of Sen. McConnell) (contending that the Farm Bill "probably violates our trade agreements"). Senator Corzine predicts that the Farm Bill's counter-cyclical subsidies will undermine U.S. agricultural trade policy by driving down global crop prices. *Id.* at S4036.

92. *See* Sanger, *supra* note 2 (reporting that President Bush contends that the Farm Bill functions as a safety net for farmers without encouraging overproduction or depressing global prices in agriculture); *see also* President Signs Farm Bill, *supra* note 34 (claiming that the Farm Bill reduces government interference in the agricultural market, supports the U.S. government's commitment to open trade, and complies with U.S. obligations under the WTO); *supra* notes 79-91 and accompanying text (explaining that because counter-cyclical payments are tied to price and production levels and are unpredictable, they could cause the United States to breach the Agreement on Agriculture).

U.S. Allowed Total AMS.[93] The Administration's claims are misguided because the costs of the counter-cyclical payments are difficult to forecast and market downturns could cause the amount of subsidies the USDA is required to allocate to rise beyond predicted levels despite the Secretary's theoretical power to decrease subsidies in anticipation of a breach.[94] Moreover, the fact that Congress found it necessary to include a provision in the Farm Bill regarding the Secretary's powers in the event of a U.S. breach of the Agreement on Agriculture illustrates the likelihood that such a breach could occur under the Bill.[95]

## B. FARM BILL SUBSIDIES LIKELY VIOLATE THE SCM AGREEMENT

In addition to violating the Agreement on Agriculture, the Farm Bill's counter-cyclical payments likely violate the SCM Agreement.[96] The DSB Panel report on U.S. subsidies on upland cotton illustrates the WTO's position that at least some counter-cyclical payments cause significant price suppression and, therefore,

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93. *See* Farm Security and Rural Investment Act § 1601(e)(1) (stating that if the Secretary of Agriculture determines that Farm Bill subsidies may exceed permitted levels, the Secretary may, "to the maximum extent practicable," adjust the amount of subsidies distributed so that they do not exceed such allowable levels); *see also* White House, *Policies in Focus: More Information on the Farm Bill* (alleging that the Farm Bill contains a "circuit breaker" that is meant to ensure U.S. compliance with the Agreement on Agriculture), *at* http://www.whitehouse.gov/infocus/farminfo/ (last visited Sept. 9, 2005).

94. *See Dangerous Activities*, *supra* note 2 (relaying that European countries thought that, despite the Farm Bill's clause allowing the Secretary to cut subsidies if they rise too high, the United States likely will breach the Agreement on Agriculture); *see also* Kreuzhuber, *supra* note 6 (maintaining that the costs of counter-cyclical payments are difficult to predict and could easily result in exceeding the allowed limit, despite the Secretary's power to reduce payments if necessary).

95. *See* Farm Security and Rural Investment Act § 1601(e)(1) (allowing the Secretary of Agriculture to cut Farm Bill subsidies if they rise at unpredictable levels and cause U.S. subsidies to rise beyond the allowable limit).

96. *See* SCM Agreement, *supra* note 14, art. 5(c) (forbidding any Member State from distributing subsidies that "serious[ly] prejudice" other Members). A subsidy causes "serious prejudice" if it results in significant price suppression or depression of a commodity in international markets. *Id.* art. 6.3(c); *see also supra* Part II.A.2 (explaining that counter-cyclical payments cause overproduction and, therefore, price depression in world markets).

trade-distortion in the world market.[97] As cotton is just one of the covered commodities in the Farm Bill, it is likely that WTO Members could successfully challenge the legality of U.S. counter-cyclical payments on other crops.[98] Therefore, the DSB Panel's decision logically permits the conclusion that counter-cyclical payments on other crops, in addition to cotton, likely cause serious prejudice to the interests of other countries and violate the SCM Agreement.[99]

### C. THE FARM BILL IS INCONSISTENT WITH THE PRINCIPLES OF THE GENEVA FRAMEWORK

Prior to the Farm Bill, U.S. spending on trade-distorting subsidies constituted only a fraction of the total amount of support that the

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97. *See* WTO Report on U.S. Cotton Subsidies, *supra* note 15, at 349 (finding that U.S. counter-cyclical cotton subsidies violate the SCM Agreement because they cause price suppression in world markets and thereby seriously prejudice Brazil's interests). The Panel mandated that the United States correct their adverse effects or remove them. *Id.* at 350-51. *But see* Office of the U.S. Trade Representative, Dispelling Myths About U.S. Support to Cotton Farmers: U.S. Programs Have Not Caused Low Cotton Prices and Hurt Foreign Growers 1-4 (Sept. 8, 2004) [hereinafter Dispelling Myths] (disputing the DSB Panel's finding that counter-cyclical payments caused significant price suppression in the world cotton market from 1999-2001), *available at* http://www.ustr.gov/assets /Document_Library/Fact_Sheets/2004/asset_upload_file784_6153.pdf (last visited Sept. 9, 2005). Former U.S. Trade Representative Zoellick asserted that although Brazil and other countries alleged that the Farm Bill increases domestic support to U.S. farmers, which in turn depresses prices and distorts trade, world cotton prices have actually increased since the passage of the Farm Bill. *Id.* at 1-2. Zoellick cited three studies that claim that the elimination of certain U.S. domestic subsidies would result in only a small increase in cotton prices. *Id.* at 2-3. However, Zoellick admitted that the United States takes issue with "important conceptual and methodological aspects" of the studies he cited. *Id.* at 3.

98. *See* Farm Security and Rural Investment Act § 1104(c) (showing that the government must make counter-cyclical payments to upland cotton producers); *see also* Elizabeth Becker, *Lawmakers Voice Doom and Gloom on W.T.O. Ruling*, N.Y. TIMES, Apr. 28, 2004, at C1 (commenting that the WTO ruling "calls into question" the Farm Bill because the Bill increased subsidies for many commodity crops in addition to cotton), *available at* LEXIS, News Library, NYT File; *Unpicking Cotton Subsidies*, *supra* note 55 (suggesting that the WTO also could find that U.S. barley or corn subsidies violate WTO agreements).

99. *See* WTO Report on U.S. Cotton Subsidies, *supra* note 15, at 347-50 (suggesting that counter-cyclical subsidies may violate the SCM Agreement by virtue of their generally trade-distorting effects in world agricultural markets).

Agreement on Agriculture allows the United States to spend.[100] Under the Farm Bill, however, the U.S. Current Total AMS has nearly reached the allowed limit of $19.1 billion, and this figure does not take into account the market fluctuations that potentially could push subsidies above the $19.1 billion ceiling.[101] Due to its effect of dramatically increasing U.S. trade-distorting subsidies, the Farm Bill has been a major obstruction to WTO Member States achieving consensus in the Doha Round.[102]

### *1. The Farm Bill Cannot Conform to the Geneva Framework Provision Calling for a Twenty Percent Cut in Overall U.S. Trade-Distorting Agricultural Subsidies*

Under the Geneva Framework, the United States promised to cut its allowable limit on overall trade-distorting agricultural subsidies by twenty percent during the first year following passage of a final Doha agreement.[103] Since U.S. spending is close to the limit of allowed support, implementation of a new WTO agreement cutting

100. *See* Johnson, *supra* note 5, at 456 (indicating that under the Freedom to Farm Act, the U.S. Current Total AMS was approximately $10.4 billion per year, which is well under the $19.1 billion allowed amount); *see also* Nelson, *supra* note 5, at 32.

101. *See* 148 CONG. REC. S4137 (daily ed. May 9, 2002) (statement of Sen. Specter) (predicting that the Farm Bill will cause the total amount of agricultural subsidies over the next decade to reach an average of $19 billion per year); *see also supra* note 90 and accompanying text (explaining that the amount of subsidies the U.S. government must distribute to producers under the counter-cyclical system is unpredictable).

102. *See* Altman, *supra* note 12 (explaining that the Director General of the WTO, Dr. Supachai Panitchpakdi, found that the Farm Bill, by increasing U.S. subsidies, was hampering the Doha Round trade talks); *see also* Sanger, *supra* note 2 (quoting the director of the University of Maryland's Center for Security and Economic Policy as saying that, prior to the passage of the Farm Bill, "Europeans will feel that they are no longer the stand-out sinners" and that "[t]he Japanese will feel relieved, and it's hard to imagine how it would be possible to negotiate a new global agreement"); Becker, *supra* note 98 (finding that former U.S. Trade Representative Zoellick contributed to the breakdown of Doha Round trade talks in Cancun by refusing to cut agricultural subsidies and insisting on preserving the Farm Bill); *The WTO Under Fire*, *supra* note 17 (citing the Farm Bill's dramatic increase in domestic subsidies and the United States' refusal to reduce cotton subsidies at the WTO negotiations in Cancun as contributing to the stagnation of the Doha Round talks).

103. *See supra* note 66 and accompanying text.

allowable support by twenty percent would require the United States to immediately and drastically reduce the amount it spends on subsidies to prevent breach of the new agreement.[104] Only if the U.S. Trade Representative could persuade the WTO to reclassify the Farm Bill's counter-cyclical payments as blue box subsidies, instead of amber box subsidies, could the Bill possibly survive a new WTO agreement.[105]

Former U.S. Trade Representative Robert Zoellick incorrectly contended that counter-cyclical payments do not count toward amber box limits because they are linked only to price and not to production.[106] First, the fact that the subsidies fluctuate based on price, regardless of whether they relate to production levels, is enough to make them trade-distorting.[107] Second, Zoellick's premise that there is no link between counter-cyclical payments and current production levels depends on an illusory distinction between using crop yields from 1998-2001 to determine the amount of a counter-cyclical payment and using the crop yield only from the most recent year.[108] Farmers likely will expect crop yields to continue to be

104. *See* Geneva Framework, *supra* note 19, ¶ 7 (calling for a twenty percent reduction in total allowable AMS for each Member State). Since a twenty percent reduction in overall permitted subsidies under the Geneva Framework would entitle the United States to spend only $15.28 billion per year, subsidies costing $19 billion per year clearly would violate the Framework. *Id.*; *see also supra* note 74 and accompanying text.

105. *See* Zoellick Press Conference, *supra* note 13 (revealing that former U.S. Trade Representative Zoellick tried to induce the WTO to reclassify counter-cyclical payments as blue box instead of amber box subsidies so that they will not count towards U.S. Current Total AMS). Zoellick made clear to many WTO Members that this is a key point for the United States in reaching a Doha Round agreement. *Id.*

106. *See* Zoellick Press Conference, *supra* note 13 (conceding that the WTO has not endorsed the idea of allowing counter-cyclical payments to be considered blue box instead of amber box subsidies). Zoellick claimed that counter-cyclical payments are "basically" no longer linked to production. *Id.*; *see also* Dispelling Myths, *supra* note 97, at 9 (illustrating Zoellick's claim that the Farm Bill's payments to cotton farmers are tied only to price).

107. *See supra* notes 84-91 and accompanying text (explaining that because counter-cyclical payments are linked to current crop prices, they guarantee producers certain prices for their crops and, consequently, cause over-production and trade-distortion).

108. *See* Farm Security and Rural Investment Act of 2002 § 1102(e), 7 U.S.C.A. §§ 7912(e) (West Supp. 2005) (utilizing the crop years 1998-2001 instead of the

updated and will have an incentive to overproduce because of the anticipation of receiving a certain amount of money per unit of crop produced.[109] If there were any doubt as to the proper characterization of counter-cyclical payments, the WTO's recent ruling that U.S. subsidies to cotton farmers are prejudicial to other Member States clarifies the WTO's judgment that counter-cyclical payments are highly trade-distorting and count toward amber box limits.[110]

Leaving the counter-cyclical payment system intact would force the United States to breach the Geneva Framework requirement that U.S. Current Total AMS be less than $15.28 billion per year (twenty percent less than the current limit of $19.1 billion).[111] The Secretary of Agriculture could utilize the provision allowing the USDA to reduce subsidies as deemed necessary, but the provision's purpose probably was to allow the Secretary to correct small increases in the counter-cyclical payments due to market fluctuations, not to implement an entirely new WTO agreement.[112] Thus, Congress likely

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crop year of 1995, which is used for calculating direct payments, resulting in counter-cyclical payments tied to more recent production levels); *see also* Kreuzhuber, *supra* note 6, at 2 (asserting that when the Farm Bill allows updated crop yields, the subsidies effectively re-couple to production levels).

109. *See* 148 CONG. REC. S4036 (daily ed. May 8, 2002) (statement of Sen. Corzine) (contending that the counter-cyclical payments will naturally lead to overproduction because they are proportional to production levels); *see also* UNDERSTANDING THE WTO, *supra* note 10, at 28 (explaining that overproduction will result when the amount of government subsidies paid to farmers depends on the amount of crops the farmers produce); Kreuzhuber, *supra* note 6, at 2 (contending that farmers receiving counter-cyclical payments likely assume that the U.S. government will allow future updating of crops, which encourages overproduction).

110. *See* WTO Report on U.S. Cotton Subsidies, *supra* note 15, at 347-50 (implying that since the counter-cyclical payments to cotton producers are highly trade-distorting, the government must consider them amber box subsidies and count them towards U.S. Allowed Total AMS).

111. *See* Geneva Framework, *supra* note 19, ¶ 7 (requiring each Member to reduce its total trade-distorting domestic support to equal to or less than eighty percent of the currently permitted levels).

112. *See* Farm Security and Rural Investment Act § 1601(3) (indicating that the Secretary of Agriculture has the power to decrease the amount of subsidies he or she distributes to prevent the United States from providing support in excess of allowable levels). The statutory language does not indicate that Congress meant this provision to apply to a situation where the Secretary must drastically change

would have to repeal or drastically amend the Farm Bill in order to reduce the overall amount the United States spends on trade-distorting subsidies.[113]

### *2. The Farm Bill Cannot Coexist with the Geneva Framework Requirement that Member States Cap Trade-Distorting Support for Specific Products at Average Respective Levels*

The Farm Bill does not set any limit on the amount of subsidies that the government may distribute to the producers of any particular commodity.[114] However, the Geneva Framework specifies that Members must impose limits on the amount of subsidies they distribute for the production of specific commodities.[115] The recent WTO ruling on U.S. cotton subsidies illustrates the WTO's belief that a country can distribute too many subsidies to producers of any one commodity so as to distort world trade in that commodity.[116] Since the Farm Bill does not limit trade-distorting counter-cyclical payments in any way, it could not survive a new Doha agreement that calls for caps on product-specific support.[117]

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subsidy allocation to force the United States to comply with a new WTO agreement. *Id.*

113. *See supra* notes 111-12 and accompanying text.

114. *See* Farm Security and Rural Investment Act §§ 1103-1104 (lacking any mention of limitations of direct or counter-cyclical payments); *see also* Kreuzhuber, *supra* note 6, at 4 (indicating that there are virtually no limits on the amount of payments that any one producer may receive under the Farm Bill); *see also supra* note 3 and accompanying text (contrasting the Farm Bill with the 1996 Freedom to Farm Act, the latter of which specified payment limitations on domestic agricultural subsidies).

115. *See* Geneva Framework, *supra* note 19, ¶ 9 (capping product-specific AMSs at their respective average levels in order "[t]o prevent circumvention of the objective of the Agreement through transfers of unchanged domestic support between different support categories").

116. *See* WTO Report on U.S. Cotton Subsidies, *supra* note 15, at 349.

117. *Compare* Farm Security and Rural Investment Act § 1104 (demonstrating that there is no limit imposed on the amount of counter-cyclical payments that may be distributed to producers of any one commodity), *with* Geneva Framework, *supra* note 19, ¶ 9 (providing that Member States must impose product-specific caps on domestic support spending).

## III. RECOMMENDATIONS

Congress should repeal the Farm Bill and enact an agriculture bill that embraces free trade principles to remedy U.S. violations of the Agreement on Agriculture and to ensure that the United States will comply with a new Doha Round agreement on agriculture.[118] In its stead, Congress should enact a farm bill that rewards subsidies on the basis of conservation and environmental practices and, therefore, is not trade-distorting.[119]

### A. CONGRESS SHOULD REPEAL THE FARM BILL OF 2002

The Farm Bill cannot legally co-exist with U.S. obligations under the Agreement on Agriculture or potential obligations under a new WTO agreement as outlined by the Geneva Framework, and it contravenes sound domestic and international agricultural policy. First, Congress should repeal the Farm Bill because the counter-cyclical payments violate the Agreement on Agriculture.[120] Second, the Farm Bill is hampering Doha Round negotiations and continues to pose a threat to their completion.[121] Third, the Farm Bill is inconsistent with the promises made in the Geneva Framework and could not co-exist with a final Doha Round agreement on agriculture.[122] Fourth, subsidies under the Farm Bill cause overproduction and drive down crop prices, thereby adversely affecting the economies of many other countries, especially

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118. *See* discussion *infra* Part III.A (finding that Congress should repeal the Farm Bill because it violates WTO Agreements and constitutes poor domestic and international policy).

119. *See* discussion *infra* Part III.B.

120. *See* discussion *supra* Part II.A.2 (demonstrating how counter-cyclical payments cause price depression in world markets and easily could cause U.S. expenditures on agricultural subsidies to rise above the amount allowed by the Agreement on Agriculture).

121. *See World Trade Talks: A Step Forward*, ECONOMIST, Aug. 7, 2004 (warning that the Doha Round will fail unless the President makes reaching a final agreement a top priority), *available at* 2004 WLNR 10895744.

122. *See id.* (maintaining that the Geneva Framework "ought to force changes to America's grotesque farm subsidies"); *see also* discussion *supra* Part II.B (explaining the reasons why the counter-cyclical payments could not conform to the Geneva Framework).

developing nations.[123] In contrast, world agricultural markets that are unencumbered by trade-distorting subsidies combat poverty and help developing countries' economies.[124] Fifth, the Farm Bill could undermine U.S. trade policy by causing countries to be less inclined to open their markets to U.S. producers.[125]

Lastly, the Farm Bill's trade-distorting domestic subsidies actually hurt smaller, family-owned farms in the long run.[126] There is a

123. *See* 148 CONG. REC. S4029 (daily ed. May 8, 2002) (statement of Sen. Bunning) (maintaining that the Farm Bill's counter-cyclical payments will lead to overproduction of subsidized crops, which will cause world prices of those commodities to fall). Senator Corzine explained that when a government encourages the overproduction of a commodity, world prices for the commodity fall, which adversely affects producers of that commodity around the world. *Id.* at S4036; *see also* Griswold, *supra* note 11 (maintaining that the Farm Bill hurts the farmers of the world's poorest countries). *See generally Trade: Sour Subsidies*, ECONOMIST, Apr. 17, 2004 ("Rich-country farm subsidies prevent the poorest countries from selling some of the only goods, other than illegal drugs, that they are able to export."), *available at* 2004 WLNR 6512297; *supra* notes 79-83 and accompanying text.

124. *See, e.g.*, Jeffrey Schott, *Unlocking the Benefits of World Trade*, ECONOMIST, Nov. 1, 2003 (reporting that least developed countries could benefit substantially from freer trade with the United States), *available at* LEXIS, News Library, ECON File; *Harvesting Poverty: The Unkept Promise*, N.Y. TIMES, Dec. 30, 2003, at A20 (reporting that there is a consensus among multilateral economic and development agencies that rich nations' farm subsidies hurt the economies of developing countries), *available at* 2003 WLNR 5242870. The World Bank predicts that "an end to trade-distorting farm subsidies and tariffs could expand global wealth by as much as a half-trillion dollars and lift 150 million people out of poverty by 2015." *Id. But see, e.g.*, Gonzalez, *supra* note 42, at 435-37 (arguing that free trade does not promote economic prosperity in developing countries); *Nothing to Sell*, ECONOMIST, May 27, 2004 (explaining that the problem with free trade is that it is not much use to a developing country if it is so poor that it has nothing to sell), *available at* 2004 WLNR 15299002.

125. *See* 148 CONG. REC. S4036 (daily ed. May 8, 2002) (statement of Sen. Corzine) (expressing concern that developing countries hurt by U.S. subsidies may be less likely to open their markets to American companies); *see also* Griswold, *supra* note 11 (quoting an E.U. official as saying that the U.S. Farm Bill hurts the United States' credibility and negotiating power in WTO meetings).

126. *See* 148 CONG. REC. S4029 (daily ed. May 8, 2002) (statement of Sen. McConnell) (noting that the legislation will end up benefiting the largest farms because the more a farmer can produce, the more payments he will receive under the Farm Bill); *see also Congress at the Trough*, *supra* note 6, at 14 (pointing out that the irony in the Farm Bill is that it actually works a "terrible disservice" to farmers). Price depression that results from overproduction of crops can lead to political pressure to help farmers by instituting more subsidies, thereby

general consensus that the U.S. government distributes two-thirds of Farm Bill subsidies to only ten percent of U.S. farms, causing the Bill to favor large farm conglomerates.[127] Many Senators from states with significant farming constituencies voted against the Farm Bill because they correctly believe that domestic subsidies cause overproduction of crops, depressing prices and leading to a cycle of continuing subsidies and overproduction.[128] This hurts agricultural producers—especially small, family-owned farms.[129]

### B. CONGRESS SHOULD IMPLEMENT A NEW FARM BILL BASED ON FREE TRADE PRINCIPLES AND IN COMPLIANCE WITH THE GENEVA FRAMEWORK

A new farm bill should not subsidize U.S. farmers based on the types of crops planted, the amount of crops produced, or the current

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perpetuating a cycle of overproduction, price depression and increasing subsidies. *Id.*

127. *See* 148 CONG. REC. S4028 (daily ed. May 8, 2002) (statement of Sen. Bunning) (noting that this disparity in distributions will further "contribute to the decline of the family farm" and take focus away from those who need help the most); *see also* Riedl, *supra* note 74, at 3 (highlighting that the largest agribusinesses receive the largest subsidies because they produce the most crops). Additionally, because the Farm Bill awards subsidies to individuals as opposed to farms, large farm conglomerates can sign up every employee to receive subsidies. *Id.*

128. *See* S. Res. 103, 107th Cong. (2002) (showing that Senators from Arizona, Florida, Kansas, Kentucky, New Hampshire, New Mexico, Ohio, Pennsylvania, Rhode Island, Utah, Virginia, and Wyoming voted against the Bill). The Farm Bill passed the Senate 64 to 35, with one Senator absent. *Id.*; *see also* 148 CONG. REC. S4029 (daily ed. May 8, 2002) (statement of Sen. Bunning).

129. *See* 148 CONG. REC. S4029 (daily ed. May 8, 2002) (statement on Sen. McConnell) (concluding that the Farm Bill will not help the vast majority of Kentucky farmers but instead will help the wealthy, corporate farms). Senator McConnell thought that the "winners" of the Farm Bill include large farm conglomerates that are eligible for almost unlimited subsidies, and the "losers" include small, family farms as well as U.S. taxpayers, who must pay higher prices for produce. *Id. See generally* Brian M. Riedl, *Agriculture Lobby Wins Big in New Farm Bill* (The Heritage Found., Backgrounder No. 1534, 2002) (finding that the Farm Bill is more like corporate welfare than income support for struggling, family-owned farms, and providing statistics on Fortune 500 companies, members of Congress, and other wealthy individuals and entities receiving extremely large payments under the Farm Bill), *at* http://www.heritage.org/Research/Agriculture/BG1534.cfm (last visited Sept. 9, 2005).

market prices of the crops,[130] but rather should grant subsidies to farmers based on their compliance with conservation and other environmental programs.[131] The Farm Bill specifies that direct and counter-cyclical payments are contingent on a farmer's promise to abide by certain environmental requirements,[132] and the Conservation Security Program in the Bill subsidizes farmers who agree to implement certain conservation programs.[133] However, these conservation programs are optional as opposed to mandatory.[134] In a new farm bill, conservation incentives should be the *only* factor relevant in determining whether a producer receives subsidies from the government.[135]

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130. *Cf.* Farm Security and Rural Investment Act §§ 1103-1104 (allocating current subsidies based on the type of crop produced, the amount of production, and, in the case of counter-cyclical payments, the market prices of the crops).

131. *See* 150 CONG. REC. S11276, S11278 (daily ed. Oct. 11, 2004) (statement of Sen. Harkin) (remarking that the large agricultural producers tend to benefit most under the Farm Bill and that the Bill's Conservation Security Program is a step in the right direction toward linking subsidies with environmental and conservational programs). Senator Harkin criticized President Bush for claiming to support conservation programs but advocating the reduction of available conservation funds to combat environmental emergencies. *Id.* at S11278-79; *see also* Becker, *supra* note 66, at C2 (reporting that Pascal Lamy, the E.U. Trade Commissioner, urged the United States to follow the E.U.'s lead in granting subsidies to reward farmers for protecting the environment rather than for producing commodities).

132. *See* Farm Security and Rural Investment Act § 1105(a)(1)(A)-(C) (indicating that in order to receive subsidies under the Farm Bill, agricultural producers must agree to comply with certain conservation, wetland protection, and planting flexibility requirements). Additionally, farmers must use the land for an agricultural or conservational purpose and must keep the land in good condition. *Id.* § 1105(a)(1)(D)-(E).

133. *See id.* § 1238A(b)(1) (stating that to be eligible for the Conservation Security Program, a farmer must submit and obtain approval of a conservation security plan). The farmer must enter into a conservation security contract with the Secretary to carry out the plan. *Id.*

134. *See id.* § 1238B-C(b) (explaining that if the producer abides by the contract, the Secretary will make annual payments to cover implementation costs and will reward conservation efforts).

135. *See* Becker, *supra* note 66, at C2 (commenting that the E.U. Trade Commissioner believes that the United States may have to change its agriculture policy to award subsidies for conservation efforts in order to comply with WTO obligations); *see also Farm Subsidies: Last of the Summer Whine?*, ECONOMIST, Aug. 21, 2004 (praising Britain's implementation of a new agriculture policy in

An example of an agriculture program that aims to allocate subsidies independently from crop production and price levels is the E.U.'s recently reformed Common Agricultural Policy ("CAP").[136] The reformed CAP provides for a "single farm payment" in which farmers receive subsidies in the form of a flat rate per unit of land so long as the farmers keep their land in good agricultural and environmental condition and abide by certain other regulations, such as food safety and animal welfare laws.[137]

With this model in mind, Congress should abolish those subsidies with amounts depending on price and production levels—counter-cyclical payments—for the numerous reasons articulated in this Comment.[138] Direct payments should continue, but not as they exist under the current Farm Bill.[139] The USDA should not allocate direct payments to farmers based on the amount of crop they produced in any year or combination of years, but rather should distribute a certain amount of money per acre of land to those producers who comply with certain conservational and environmental requirements.[140] If this were the case, domestic subsidies to U.S.

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which subsidies depend on farmers' compliance with environmental policies), *available at* 2004 WLNR 10889818.

136. *See* European Union, *CAP Reform – A Long-Term Perspective for Sustainable Agriculture* [hereinafter CAP Reform] (noting that E.U. farm ministers adopted a dramatic reform to the CAP on June 26, 2003), *available at* http://www.europa.eu.int/comm/agriculture/capreform/index_en.htm (last visited Sept. 9, 2005). According to the reformed CAP, the vast majority of domestic agriculture subsidies that the E.U. allocates will not be tied to production levels. *Id.*

137. *See id.*; *see also Last of the Summer Whine?*, *supra* note 135 (noting that Britain was scheduled to implement E.U. reforms beginning on January 1, 2005, by subsidizing English farms according to a flat rate per hectare).

138. *See* discussion *supra* Part II.A.2 (demonstrating that counter-cyclical payments are highly trade-distorting); *see also* discussion *supra* Part III.A (citing the adverse social and political repercussions of counter-cyclical payments). *See generally* discussion *supra* Part II (finding that the counter-cyclical payments cause the United States to breach the Agreement on Agriculture and likely will violate a new WTO agreement).

139. *See* discussion *supra* Part I.A.1 (explaining how the Farm Bill's direct payment system works); *see also* discussion *supra* Part II.A.1 (noting that the direct payments are not trade-distorting even though the Secretary of Agriculture calculates their amounts according to production levels at some point in the past).

140. *See* CAP Reform, *supra* note 136 (explaining that the single-farm payment method will enable farmers to receive subsidies from the government based on a

farmers would not cause trade-distortion and would assist America's farmers while providing the government and taxpayers with the benefit of improved environmental conditions on U.S. farmland.[141]

The E.U. expects CAP reform to cause European farmers to become more competitive and market-oriented while still benefiting from income stability.[142] A new U.S. farm bill that mirrors the CAP reform by excluding subsidies linked to production and price levels and instituting those dependent on environmentally sound practices would ensure a U.S. agricultural policy based on a free-market philosophy and in conformity with WTO agreements.[143]

## CONCLUSION

The United States was moving in the direction of promoting free trade in agriculture until Congress passed the Farm Bill in May of

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flat rate per unit of land in exchange for keeping their land in good agricultural and environmental condition).

141. *See id.* (implying that the new CAP system will provide necessary aid to E.U. farmers and will have the advantage of simultaneously improving the environmental condition of farmland).

142. *See id.* (finding that the E.U. reforms will enable farmers to produce according to market demands and will also strengthen the E.U.'s negotiating powers in formulating a new WTO agreement on agriculture).

143. *See* Agreement on Agriculture, *supra* note 5, Annex 2 (providing that subsidies not tied to current production or price levels, which include subsidies through environmental protection programs, or green box subsidies, are not subject to reduction commitments); *see also Domestic Support Boxes*, *supra* note 44 (clarifying that payments allocated through conservational or other environmental programs are green box subsidies); DAVID DANA, WTO LEGAL IMPACTS ON COMMODITY SUBSIDIES: GREEN BOX OPPORTUNITIES IN THE FARM BILL FOR FARM INCOME THROUGH THE CONSERVATION AND CLEAN ENERGY DEVELOPMENT PROGRAMS 1 (Envtl. L. & Pol'y Center, 2004) (contending that the Farm Bill's subsidies rewarding farmers for conservation efforts are likely green box subsidies), *available at* http://www.elpc.org/energy/WTO.Farm%20Bill%20Paper.July%2020.2004.pdf (last visited Sept. 9, 2005). Since the current Agreement on Agriculture labels payments linked to environmental programs as green box subsidies, similar payments in a new farm bill likely would have the same classification. *Id.*; *see also* CAP Reform, *supra* note 136 (contending that an agricultural policy that rewards farmers for environmental and conservational efforts but not for amounts of crop produced results in a free-market agricultural economy). An environmentally-driven policy likely would prevent a Member State from breaching WTO subsidy reduction commitments. *Id.*

2002.[144] The Farm Bill's counter-cyclical payments puts the United States at risk of spending more than the $19.1 billion per year limit imposed by the Agreement on Agriculture.[145] These subsidies also are likely to cause serious prejudice to other Members' interests and therefore violate the SCM Agreement.[146] Additionally, the Farm Bill has been a large factor in delaying the completion of Doha Round negotiations and almost certainly could not comport with a final Doha Round agreement.[147] Congress should repeal the Farm Bill and, in its place, enact legislation that reflects a commitment to free trade principles and awards subsidies to farmers for conservation measures rather than for the overproduction of commodities.[148]

## POSTSCRIPT

Since this comment was accepted for publication, several significant events relating to U.S. agriculture subsidies and the WTO have occurred. First, in April of 2005, the U.S. Congress passed a resolution regarding the 2006 federal budget that included a pledge to cut spending on agriculture by $3 billion over the next five years.[149] Second, the WTO has scheduled its next Ministerial

144. *See supra* note 2 and accompanying text (explaining how the 1996 Freedom to Farm Act reduced U.S. trade-distorting subsidies, but the Farm Bill expanded them and created new ones).

145. *See* Zoellick Press Conference, *supra* note 13; *see also* discussion *supra* Part II.A.2 (contending that the Farm Bill's counter-cyclical payments are highly trade-distorting and likely will cause the United States to breach its obligations under the Agreement on Agriculture).

146. *See supra* Parts I.C, II.B (describing the DSB Panel's ruling that counter-cyclical payments to cotton producers under the Farm Bill violate the SCM Agreement and concluding that counter-cyclical payments in general likely cause serious prejudice to other countries' interests because of their significant trade-distorting effects).

147. *See supra* Part II.C (maintaining that the counter-cyclical subsidies in the Farm Bill almost certainly violate the Geneva Framework, which calls for a twenty percent reduction of the U.S. Allowed Total AMS).

148. *See supra* Part III (recommending that the United States institute an agriculture law similar to the reformed CAP, which provides income stability to farmers by way of rewarding them for their environmental and conservational practices).

149. *See Congress Cuts $3 Billion in Agriculture Spending*, AMERICAN FARM BUREAU, May 2, 2005 (specifying that a cut of $173 million would occur in the first year of implementation of the resolution), *available at* http://www.fb.org/

Conference for December 13-18, 2005, during which the Member States will have an opportunity to ratify a new agreement on agriculture.[150] Third, on October 10, 2005, U.S. Trade Representative Rob Portman announced that, in light of the upcoming WTO negotiations, the United States is pledging to cut its Total AMS (amber box subsidies) by sixty percent over a five-year period.[151] It is unclear whether the U.S. Trade Representative's proposal intends the reduction to apply to Current Total AMS or Allowed Total AMS, and the proposal does not specify what percentage of the cut would be made during the first year or how the United States would achieve this cut.[152]

The proposal is consistent with this comment's assertion that the United States must substantially cut domestic trade-distorting subsidies to make a new WTO agreement on agriculture possible.[153] If, as this comment contends, the Farm Bill causes the United States to spend approximately $19 billion per year on amber box subsidies, implementing a sixty percent reduction over five years (assuming the reduction would be made in equal proportions each year) would

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news/fbn/05/05_02/html/congress.html (last visited Oct. 10, 2005). However, the Senate omitted this cut from the spending bill it passed on September 22, 2005, and the agriculture committees are expected to decide in the near future how to implement this cut. *Senate Passes $100B Agriculture, Drug Bill*, FOX NEWS, Sept. 22, 2005, *available at* http://www.foxnews.com/story/0,2933,170155,00.html (last visited Oct. 10, 2005).

150. *See* World Trade Org., The Sixth WTO Ministerial Conference (noting that the meeting will take place in Hong Kong, China), *at* http://www.wto.org/english/thewto_e/minist_e/min05_e/min05_e.htm (last visited Oct. 10, 2005).

151. *See* Office of the U.S. Trade Representative, *U.S. Proposal for WTO Agriculture Negotiations* (Oct. 10, 2005) (outlining a U.S. proposal regarding all three aspects of WTO agriculture negotiations: domestic subsidies, market access, and export competition), *available at* http://www.ustr.gov/Trade_Sectors/Agriculture/US_Proposal_for_WTO_Agriculture_Negotiations.html (last visited Oct. 10, 2005). The proposal specifies that the United States will cut spending on amber box subsidies by sixty percent if Member States that spend over $25 billion per year on amber box subsidies will cut their spending by eighty-three percent. *Id.*

152. *Id. But see To Doha's Rescue*, ECONOMIST, Oct. 13, 2005 (contending that the cuts in the U.S. proposal refer to reductions on allowable limits rather than on current amounts spent).

153. *See supra* note 102 and accompanying text (explaining that the Farm Bill has impeded the progress of WTO Doha Round agriculture negotiations).

result in a cut of approximately $2.28 billion during the first year.[154] Thus, the U.S. Trade Representative's proposal, if implemented, would be a step in the right direction, but Congress would have to drastically amend or repeal the Farm Bill of 2002 to achieve the proposal's goals.[155]

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154. *See supra* note 74 and accompanying text (demonstrating that the USDA spends approximately $19 billion per year on trade-distorting subsidies). If the U.S. proposal's cut is applied to the U.S. Allowed Total AMS of $19.1 billion, the resulting cut would be approximately $2.29 billion per year. *See supra* note 13 and accompanying text. The U.S. Trade Representative's proposal may not be entirely consistent with Congress' pledge because the budget cut would decrease spending on agriculture subsidies by only $173 million in 2006. *See Congress Cuts $3 Billion in Agriculture Spending*, *supra* note 149.

155. *See* discussion *supra* Part II.C.1 (explaining that the Farm Bill would not be able to survive the twenty percent cut in amber box subsidies that the Geneva Framework mandates).